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CHARLES ELMORE GROPLEY

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1941

No. 723

THE UNITED STATES OF AMERICA, *Appellant*,

*v.*

THE MASONITE CORPORATION, CELOTEX CORPORATION,  
CERTAIN-TEED PRODUCTS, *et al.*, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR THE APPELLEE  
ARMSTRONG CORK COMPANY**

✓ HORACE R. LAMB,

✓ WALTER F. KAUFMAN,

*Counsel for Appellee*

*Armstrong Cork Company.*

Dated: April 6, 1942.

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## BRIEF FOR THE APPELLEE ARMSTRONG CORK COMPANY

### Opinion Below

The official report of the opinion delivered in the court below is reported in 40 F. Supp. 852.

### Statement

In this separate brief for appellee Armstrong Cork Company (herein called Armstrong), we shall confine ourselves to a clarification of the question on this appeal, a correction of some of the erroneous, inaccurate and misleading assertions made in the Government's brief and an answer to the Government's main contention, in so far as it affects this appellee.

The separate briefs of the appellees Masonite Corporation and Celotex Corporation adequately demonstrate that no conspiracy in restraint of trade was entered into between them; that the agency agreement which Masonite made with Celotex's predecessor in 1933 was in all respects a natural, normal and proper arrangement for the sale and distribution of Masonite hardboard by Celotex as agent for Masonite and that such an agreement followed the determination of a vigorously contested patent litigation between Masonite and the predecessor of Celotex, in which Masonite's product patent on Masonite hardboard was held valid and infringed by Celotex.

In this brief we shall show that appellee Armstrong not only did not intend to join any alleged conspiracy, originally alleged to have been entered into between Masonite and Celotex, but Armstrong did not in fact join any conspiracy to restrain trade either by entering into an agency agreement with Masonite or otherwise; that the agency agreement made in 1933 between Masonite and Armstrong's predecessor (Armstrong-Newport Company) was a valid and proper agency agreement entered into in the light of the special facts and circumstances affecting Armstrong alone (none of which facts are discussed in the Government's brief); that the 1933 agreement, as well as the 1936 superseding agreement and the agency agreement entered into in March 1941, which was in effect at the time of the trial, did not in any way restrain trade and commerce in Masonite hardboard or in any other commodity, and that, on the contrary, all of such agency agreements between Masonite and Armstrong had the direct effect of promoting interstate trade and commerce in Masonite hardboard and the indirect effect of promoting interstate trade and commerce in all other building materials manufactured and sold by appellee Armstrong.

## The Question on This Appeal

The Government's statement of the question on this appeal requires clarification.

The only question on this appeal is: Did the Government prove any restraint of interstate commerce in the manufacture and sale of Masonite hardboard?

In the Government's brief the question is stated vaguely to be "whether appellees have combined to restrain trade in violation of the Sherman Act" (brief, p. 2). The Government's counsel does not undertake to define the "trade" as to which, the Government claims, the question of restraint arises.

Based upon the record, the only question here is whether the Government proved that the defendants have combined to restrain interstate trade and commerce in hardboard manufactured and sold by appellee The Masonite Corporation (herein sometimes called "Masonite") under United States Letters Patent owned by Masonite and the validity of which has been adjudicated in the United States Circuit Court of Appeals for the Third Circuit (*Masonite Corporation v. Celotex Co.*, 66 F. (2d) 451).

In its brief the Government confuses the commerce in Masonite hardboard with commerce in "insulation board" and possibly other building materials.

In the complaint it was alleged under the heading "The Offenses Charged" that the defendants had conspired to monopolize and restrain interstate trade and commerce "in the distribution of hardboard in the United States" (R. 1, 8). There was no charge of restraint of trade and commerce in "insulation board" or any other commodity. Furthermore, in its "description of the industry" the reference was solely to "hardboard". The

record shows that the term "hardboard" means hardboard manufactured under United States Letters Patent owned by Masonite or by an alleged infringer of those patents (R. 4, 22, 193).

In the Government's brief on this appeal, under the heading "Interstate commerce in hardboard" the testimony on that subject is summarized and the statement is made that Masonite hardboard is manufactured at Laurel, Mississippi, and sent into other states and sold in interstate commerce, both from warehouses of appellees and from the Masonite factory, directly to the customers of Masonite and of the other appellees (brief, p. 8).

It is true that the record shows that the appellees are engaged in the production of other products, including not only insulation board (Exs. SS-16, 17, 18 and 19; R. 839-842), but various other building materials, such as (in the case of Armstrong) corkboard, hardboard products fabricated from Masonite hardboard (which Armstrong purchases from Masonite), fibre wall boards, loose cork, cork blocks, linoleum for walls and floor coverings and cork for flooring purposes (R. 205, 206). There is, however, no proof whatever in the record showing either (a) the total volume of the commerce in products other than Masonite hardboard, or (b) the portion of such commerce which is controlled by the appellees. There is, therefore, nothing in the record which warrants any claim by the Government in regard to any alleged restraint of commerce in products other than Masonite hardboard.

Notwithstanding that fact, however, it is stated in the Government's brief (at p. 6): "It is not disputed that appellees, considered collectively, occupy a dominant position in the production and sale of insulation board". Then follows a statement that in the year 1940 appellees

collectively sold insulation board of the value of \$29,000,000 and that they produced approximately 900,000,000 feet of insulation board. Although the appellees' sales may be large in the aggregate, it does not necessarily follow that they dominate the total commerce in insulation board, and there is no proof whatever that there is any restraint or monopolization of such commerce.

It is asserted in the Government's brief that the appellees used the agency agreements "to control the price of insulation board and other building materials" sold by its agents in combined lots with hardboard (brief, p. 47). Government counsel even goes so far as to say that "from the very beginning of the arrangements Masonite was motivated to some degree by a desire to stabilize the price of insulation board" (brief, pp. 47 and 48).

There is no proof in the record which justifies those statements. There are no agency agreements or any other agreements between Masonite or between any of the other appellees in reference to insulation board. There is no proof of any restrictions whatsoever in the manufacture and sale of insulation board. The Government's complaint and the proof at the trial relate solely to commerce in Masonite hardboard. Insulation board is not a competitor of Masonite hardboard.

In his opening statement at the trial the Government's counsel said:

"I think at the outset it is also desirable if I distinguish between hardboard and insulation board, because there is going to be a certain amount of talk about insulation board. Insulation board is also a fibre board but is also a softer board, has less tensile strength and is less resistant to moisture. It is used largely for insulation purposes and therefore is not capable of the same variety of uses as hardboard" (R. 429).

The District Court, in its opinion, pointed out that Masonite hardboard is to be distinguished from insulation board (R. 844).

There is, therefore, no basis whatever for any argument that either directly or indirectly the agency agreements relating to the sale of Masonite hardboard were used to control the price of insulation board or any other building materials.

It is respectfully submitted that the references to commerce in commodities other than Masonite hardboard can only have the effect of confusing the question presented on this appeal.

We repeat,—the only question on this appeal here is whether the Government proved any restraint of interstate trade and commerce in Masonite hardboard. That was the question considered by the District Court (R. 844).

It is stated in the Government's brief (at p. 5): "Masonite produces more than 96 percent of all hardboard sold and distributed in the United States". Since the only commerce with which we are concerned on this appeal is Masonite hardboard, manufactured by Masonite under its own product patent, it may be said that in this single instance the Government has understated the facts: Masonite manufactures and sells 100% of all of the Masonite hardboard which is sold and distributed in the United States, subject only to the determination whether a product manufactured and sold by United States Gypsum Company is also Masonite hardboard and the manufacture and sale of which by the Gypsum Company infringes the Masonite patents. That issue, as the record shows, is now before the United States District Court for the Northern District of Illinois for determination (R. 493).

The products which compete with Masonite hardboard are not considered in the Government's brief. The record shows that as early as 1933 there were 15 or 20 substitute materials actively competing with Masonite hardboard and usable for the same purpose (R. 537, 546 and 560). Among the present competing products is the widely used plywood, which, according to the testimony, is one of Masonite's "biggest competitors" (R. 179, 562).

In 1939 the retail dollar volume of sales of Masonite hardboard was estimated to be less than 1% of the total retail sales of building materials (R. 179).

To summarize, therefore,—there are no facts in the record which require the consideration of the question on this appeal from the point of view of domination of any industry or a monopolistic control thereof.

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Since the evidence consists primarily of the written agreements entered into between Masonite and other appellees, including Armstrong, the question on this appeal narrows itself down to the issue whether such agency agreements as were in existence at the time of the trial, providing for the sale of Masonite hardboard by other appellees, as agents, have the direct and necessary effect of restraining interstate trade and commerce in Masonite hardboard.

The proof of restraints, if any, must be found solely in the provisions of the existing agreements entered into in March 1941 (all prior agreements were superseded by that agreement). It is the Government's theory that the agency agreements *per se* "restrained the market". No manufacturer, consumer or buyer is shown to have been injured in any respect by reason of the making of the

agency agreement or the sales or deliveries made thereunder.

At the opening of the trial, Government counsel stated: "The issues in this case arise by reason of certain agreements which exist between Masonite and the other nine defendants. \* \* \* It is our position that all of these contracts are illegal" (R. 430).

The only agreements which then existed and now exist are the agency agreements made in March 1941.

We shall show that the agency agreements between Masonite and Armstrong did not have the *direct* effect of restraining trade in Masonite hardboard or any other commodity, but, on the contrary, they promoted such trade by making Masonite hardboard available for use by many more buyers and consumers in the building industry than would have been the case if Masonite had retained to itself the sole right to sell its patented product.

Furthermore, the agreements *indirectly* promoted the sale of other building materials manufactured and sold by Armstrong, such as wallboard, linoleum, insulation board and other products. Masonite first created consumer acceptance for its new patented hardboard in the building trades industry. Then, by entering into agency agreements with appellees, manufacturers of other building materials, such as Armstrong, were able to offer buyers a complete line of products for building purposes, including Masonite hardboard (R. 876). The agency right to sell Masonite hardboard enabled Armstrong to obtain orders for its own products, along with orders for Masonite hardboard (R. 663).

The testimony is overwhelmingly to the effect that every appellee who entered into an agency agreement with Masonite did so in order to supplement its own line of

products and in order not to lose orders for its own products because of inability to offer, as well, Masonite hardboard (R. 627, 630, 633, 635, 644, 663, 665, 709, 721).

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In considering the question on this appeal, we believe the court should also have in mind that if the view urged by the Government should prevail and if the court should adopt the Government's theory that the agency agreements, now in effect, are *per se* in restraint of trade and thus unlawful, appellee Armstrong (as well as all other agents of Masonite) will suffer the loss of the right to sell a product which, as the testimony shows, promotes the sale of the products manufactured by each agent.

Moreover, if the Government should succeed on this appeal the appellee Masonite will be directly benefited, because by destroying the agency agreements, now in effect, there will be secured to Masonite the exclusive right to sell directly to buyers all of the Masonite hardboard. Such a result, we submit, would lead to wasteful employment of capital.

Assuming that Masonite will grant licenses to the agents to manufacture Masonite hardboard, it would be necessary for the agents to duplicate existing manufacturing facilities (which are now adequate to supply all demands) or make investments in inventories of Masonite hardboard for resale. If that occurs, the burden imposed upon the smaller agents may be so great as to exclude them entirely from any participation in the trade and commerce in Masonite hardboard and which is now secured to them through the existing agency agreements.

It would rest with Masonite to determine whether manufacturing licenses would be granted, the royalties

to be charged and the cost at which inventory stocks could be acquired. Thus the direct result of the Government's effort would be to restrict the existing commerce in Masonite hardboard and the channels through which it flows; it would strengthen the exclusive monopoly now secured to Masonite under its patents, all of which, under the agency agreements, are being shared with the other appellees.

The Government should not succeed, however, because, as we shall show, the existing agency agreements do not constitute a restraint of any commerce; more particularly they do not restrain interstate commerce in Masonite hardboard.

### POINT I

**The complaint was properly dismissed:**

**(A) The Government failed to prove the making of any combination, contract or conspiracy to restrain commerce and failed to prove that any commerce was restrained;**

**(B) The facts as stipulated at the trial show the circumstances under which Armstrong entered into the agency agreement with Masonite. Those facts preclude the inference attempted to be drawn by the Government of concerted action in entering into the agency agreement and show that it was in the exercise of an independent business judgment.**

In the separate brief filed on behalf of the appellee Masonite, it is demonstrated that the Government failed to prove the making of any combination, contract or conspiracy in restraint of commerce, either in Masonite hard-

board or in any other commodity, and that Masonite did not go beyond its lawful rights, as the manufacturer and seller of Masonite hardboard and the owner of valid basic products patents covering the manufacture and sale of that commodity. In the separate briefs of appellee Masonite and appellee Celotex it is clearly shown that those appellees did not enter into any conspiracy in restraint of trade when the original agency agreements between them were made.

In this brief we shall confine ourselves to a consideration of the special facts and circumstances under which Armstrong entered into an agency agreement with Masonite. Those facts show that in the negotiations and consummation of the agency agreement Armstrong did not participate in any concerted action, either with Masonite or any other agent of Masonite. The decision to enter into an agency agreement was prompted solely by the business interests of Armstrong and independently of the act of any other agent (R. 659).

The Government's brief is devoted largely to a consideration of the circumstances under which the Celotex Company, predecessor of the Celotex Corporation, and Masonite entered into agency agreements. It appears that the first agency agreement was entered into between those appellees following a patent litigation and a determination of the Circuit Court of Appeals holding the Masonite patents valid and infringed by Celotex. (See *Masonite v. Celotex*, 66 F. (2d) 451 (CCA 3d, 1933)).

Reference is also made in the Government's brief to a patent controversy between Masonite and the Insulite Company which also followed the adjudication of the Masonite patents.

The first reference to appellee Armstrong is made at page 22 of the Government's brief. There, without even

discussing the separate circumstances under which other companies entered into agency agreements with Masonite, it is stated that, after sending a copy of a proposed agency agreement to Johns-Manville Sales Corporation, "About the same time the proposed agency agreement was sent to National Gypsum Company, Armstrong-Newport (the predecessor of Armstrong-Cork Co.), Hawaiian Cane Products, Limited, and Insulite."

The Government's brief then states: "All of these companies executed identical agreements with Masonite on various dates between October 31, 1933 and June 25, 1934. . . . (Brief, pages 22, 23).

It is apparent that the Government relies entirely upon inference to establish the entry by Armstrong into any alleged conspiracy to restrain commerce.

The facts and circumstances, however, under which Armstrong made its agency agreement with Masonite show that such an inference is entirely unwarranted.

In the stipulation between Government counsel and counsel for Armstrong, which was entered into in lieu of calling officers of Armstrong as witnesses, the following significant facts were stated (R. 656, 657 and 658):

As early as the year 1920 and prior thereto Armstrong was engaged in the manufacture and sale of cork-board insulation which, among other things, was used in the manufacture of refrigerators. Shortly after 1920 the manufacture of automatic refrigerators increased substantially, creating a large demand for Armstrong cork-board insulation and the company was doing a very large volume of business in that product.

In about the year 1928 there came into the market a fibreboard product which could be used for refrigerator

insulation as effectively as corkboard insulation and could be sold at much lower prices. There resulted a substantial decline in the demand for Armstrong corkboard for refrigerator insulation purposes.

It became apparent, therefore, that if the Armstrong Company was to hold its position in the refrigerator insulation field it must develop a fibreboard insulating material.

At that time, as now, Armstrong was and is one of the largest manufacturers of linoleum in this country, and in connection with such manufacture consumes large quantities of rosin substances, the raw material for which is extracted from pine trees grown in the South.

In the years 1932 and 1933 and thereafter down to the time of the trial, rosin material was manufactured and sold in large quantities by a company called "Newport Industries, Inc." which had its manufacturing plant at Pensacola, Florida. The rosin material is extracted from southern pine trees and in the process there is left as a residue spent pine chips.

In 1931 Armstrong Cork Company was, and now is, the largest customer of Newport Industries, Inc. for rosin products.

In carrying on its research and experiments to determine a material which could be used in the manufacture of fibreboard insulation, Armstrong discovered that the spent pine chips remaining after the pine oil and rosin are extracted provided an excellent raw material for making fibreboard. The raw material was obtainable in large quantities at low cost. Newport Industries, Inc. had developed no use for the spent pine chips, other than as a fuel.

In 1928, realizing that the spent chips could be used as a raw material in the manufacture of fibreboard in-

sulation, Armstrong made a proposal to Newport Industries, Inc. for the organization of a new company to be called Armstrong-Newport Company, to be owned one-half by Armstrong and one-half by Newport Industries, Inc., and which would build a plant to manufacture insulation board near the existing rosin plant at Pensacola, Florida.

Such a plant was constructed and the product of the new plant came on the market in the year 1931.

About that same time, however, a competing insulating material was developed by the glass industry which was usable for insulation purposes in the manufacture of refrigerators. Furthermore, during the depression of 1931 there was a severe decline in the demand for insulation material for refrigerators.

In order that the investment in the new plant at Pensacola should be turned to a profitable use, it was determined that a fibreboard insulation could be manufactured there and offered in the market as a building material for building purposes. That was done.

But it was soon recognized that in attempting to sell the new fibreboard to the lumber and building trade the Armstrong sales organization was greatly handicapped by having only a single product to offer. Armstrong's fibreboard insulation board was designated by the trade name "Temlok". It was usable for sheathing, as a plaster base, as an interior finish and for general building purposes. However, since the fibre used in its manufacture was of short length the Armstrong Temlok board did not have the tensile strength of competing insulation board.

Thereupon Armstrong's "Temlok" division gave consideration to the desirability of adding a hardboard line of products to the fibreboard insulation line.

At that time there was being offered in the market a hard board manufactured by the Celotex Company, as well as Masonite hardboard manufactured by the Masonite Corporation. After investigation of both products, Armstrong came to the conclusion that Masonite hardboard was a superior product.

As early as 1931 Armstrong endeavored to obtain from Masonite a manufacturing license under Masonite patents for the manufacture of Masonite hardboard. Since Armstrong was primarily engaged in manufacturing, its executives were of the opinion that by making additions to the existing plant at Pensacola, facilities could be added to that plant for the manufacture of Masonite hardboard.

There were discussions between Armstrong representatives and Masonite representatives looking to the granting to Armstrong of a license to manufacture Masonite hardboard and to sell such product under the Masonite patents. However, due to the fact that there was then pending the patent infringement suit between Masonite and Celotex, it was not possible to fix the terms of a manufacturing license and Armstrong was notified by Masonite in January 1932 that Masonite preferred not to issue any license to manufacture, at least for the present.

During 1933, in connection with meetings of the Fibreboard Insulation Institute, of which Armstrong and Masonite were members, Armstrong learned that the Federal Court had handed down a final decision holding the Masonite patents valid and infringed by Celotex, that thereafter a selling agency agreement had been entered into between Masonite and Celotex and that Masonite would be willing to enter into a similar selling agency

agreement with other companies who, like Armstrong, had a large national selling organization and were marketing products upon a nation-wide basis. In due course the first agency agreement, dated December 1, 1933, between Masonite and Armstrong's subsidiary, Armstrong-Newport Company, was entered into.

In brief, the situation was that Armstrong urgently desired the opportunity to offer to its customers in the building trade industry the new product, Masonite hardboard, to supplement Armstrong's line of building materials. Since its basic product patent had been upheld by judicial decision, Masonite was in a position to grant or withhold the opportunity which Armstrong sought. Accordingly, as is the case in every business agreement when a "seller's market" prevails, Armstrong had to accept the opportunity on the terms as offered by Masonite and which Masonite alone had the power and the right to prescribe.

The stipulation sets forth, further, that when Armstrong, through its subsidiary, entered into the 1933 agency agreement it did so "with the same object in mind that it had in 1931, namely, to be able to offer Masonite hardboard products to Armstrong's lumber dealer customers to whom it was then offering its fibreboard insulation" (R. 659).

The Vice President of Armstrong, Mr. Hugh McC. Clarke, who handled the negotiations for the 1933 agreement, died in 1938 (R. 656). However, he and his subordinates had reported to the President, Mr. Prentis, concerning the matter, and according to Mr. Prentis, there "were no understandings or agreements of any kind [between Armstrong and Masonite] other than as set forth in the written agreement itself" (R. 659).

Government counsel expressly agreed in the stipulation with counsel for Armstrong, as follows:

"So far as the Armstrong Company or its subsidiary, Armstrong-Newport Company, was concerned, the making of the 1933 agreement was entirely independent of, and had no relation to, the making of other similar agreements between Masonite Corporation and Celotex or between Masonite Corporation and any other persons, firms or corporations. As stated, as early as 1931 Armstrong had determined that it wanted to be in a position to sell the Masonite hardboard, and being unable to obtain a manufacturing license at that time, it accomplished as best it could the same purpose and object in making the 1933 agency agreement." (R. 659)

The stipulation further recites that during the entire period that Armstrong or its subsidiary sold Masonite hardboard under the 1933 agreement "there were no discussions between Armstrong or any of its officers or representatives with Masonite Corporation or its officers or representatives or with any other persons, as officers or representatives of any other person, firm or corporation, to fix the prices at which Masonite hardboard products should be sold by Masonite Corporation or by Armstrong or by any other persons, firm or corporation" (R. 659).

Likewise, Government counsel agreed that there were no discussions prior to the making of the agreement regarding the prices at which Masonite would sell its products either directly or through agencies (R. 659).

The 1933 agreement was replaced by a new agreement and supplement entered into in October 1936, which according to the testimony, was to clear up misunderstandings which had arisen under the 1933 agreement (R. 660).

In March, 1941 the 1936 agreement was superseded by an entirely new agreement which eliminated many of the provisions to which objection had been made by the Department of Justice and as indicated in the complaint herein. The 1941 agreement was the only agreement in effect at the date of the trial (R. 663).

Both the 1933 and the 1936 agreements contained express covenants that the prices at which Masonite sold hardboard directly would be the same as the prices at which the agent was authorized to sell Masonite hardboard. When those agreements were replaced by a new agreement made in March, 1941 those covenants were omitted. In practice, however, so far as observed by Armstrong, buyers of Masonite hardboard purchase at the same prices whether purchasing directly from Masonite or through orders placed with Armstrong as agent (R. 659).

During the entire period that the 1933 and 1936 agency agreements were in effect Masonite hardboard products consigned to Armstrong warehouses were physically segregated so that they could always be identified as the property of Masonite, although no separate signs were then placed upon the consigned hardboard to indicate ownership by Masonite (R. 661). The 1941 agreement expressly provides that consigned stocks shall be kept segregated and identified as the property of Masonite (R. 58).

Under all of the agency agreements ownership of consigned stocks of Masonite hardboard is retained by Masonite until title is transferred to a buyer (R. 120, 218, 271).

In offering hardboard to prospective buyers Armstrong salesmen pointed out that the hardboard was manufactured by Masonite Corporation, although specific mention of the Masonite Corporation was not made in any

general advertising by Armstrong and Armstrong sold the hardboard under its own trade name (R. 661).

The Armstrong price lists, however, described the hardboard and made express reference "to the fact that the sale of such hardboard products by Armstrong was pursuant to an 'agreement' with the 'Masonite Corporation'" (R. 661).

In the stipulation it was also recited that Armstrong's price list made specific reference to the "license agreement" with Masonite (R. 661).

On consigned stocks of Masonite hardboard Armstrong carried insurance applicable to consigned stocks covering any loss for which the insured may be liable (R. 662).

As of March 20, 1941 Armstrong entered into the new appointment of agent, a copy of which is attached to the supplemental answer of Armstrong (R. 117). The circumstances under which the new agency agreement was entered into are stated in the stipulation as follows:

" \* \* \* Armstrong was advised to enter into the 1941 agreement because of the pendency of this action and the belief that certain provisions of the 1936 agreement were considered by representatives of the government as inconsistent with a relationship of principal and agent between the Masonite Corporation and the Armstrong Company. Armstrong is informed that before entering into the 1941 agreement a proposed copy of the agreement was submitted to the Department of Justice by counsel for Armstrong, who stated to the attorneys for the government that Armstrong intended to enter into an agreement with the Masonite Corporation in the form as presented to the attorneys for the government. The new 'appointment of agent' agreement was actually signed on behalf of Armstrong Cork Company April 2, 1941, to be

effective as of March 20, 1941, and to continue for the period ending March 20, 1945, but subject to the right of cancellation on the part of Armstrong and of Masonite Corporation, as in said agreement provided." (R. 663, 664).

In connection with the stipulation, there were also received in evidence as defendants' Exhibits U and V two labels in current use by Armstrong on specimen samples of one type of Masonite hardboard (called Armstrong's Temboard) and a label applied to packages of another type of Masonite hardboard (called Armstrong's Temwood). The first of these labels (defendants' Exhibit U, R. 835) shows the complete disclosure of the agency of Armstrong for Masonite, because at the bottom of the printed label are the words "Agent for Masonite Corporation in the sale of Hardboard Products". Likewise, the Armstrong label applied to packages consisting of six pieces of 4'x8' of Armstrong's Temwood  $\frac{1}{8}$ " thick also contains at the bottom thereof, plainly printed, the words "Armstrong Cork Company, Building Materials Division, Lancaster, Pennsylvania—Agent for Masonite Corporation in the sale of Hardboard Products" (defendants' Exhibit V, R. 836).

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Upon the written stipulation of facts made with Government counsel, in lieu of offering testimony by witnesses, and the exhibits mentioned above, it is respectfully submitted that there is no foundation in fact for any assertion that Armstrong entered into any combination or conspiracy to restrain interstate commerce in Masonite hardboard or any other product.

In fact, the stipulation expressly negatives "any intent or desire for concerted action of any character whatso-

ever in connection with the sale of Masonite hardboard or the prices at which it would be sold" (R. 662). It states that "there has never been any agreement or understanding on the part of the Armstrong Company or its subsidiary with Masonite Corporation or with any other persons, firms, or corporations, or any agreement or understanding on the part of Masonite Corporation with other persons, firms, or corporations the purpose or effect of which was or is to restrict the persons, firms, or corporations who would have the privilege of selling Masonite hardboard products or to fix the price or prices at which Masonite hardboard products would or would not be sold" (R. 663).

In addition to the agency agreement between Armstrong and Masonite the record shows that Masonite has been and is a constant purchaser of Masonite hardboard for fabricating or processing into Armstrong's Monowall products (R. 663). Samples of Armstrong's fabricated Monowall were exhibited and the witness Wallace testified that beginning in August 1938 Masonite sold and has continued to sell Armstrong quantities of hardboard for fabricating into Armstrong's product called Monowall (R., p. 543).

There is, therefore, no restriction, so far as Armstrong is concerned, against the outright purchase from Masonite of Masonite hardboard for industrial fabricating processes as carried on by Armstrong.

Apparently, as a further attempt on the part of the Government's counsel to have the inference drawn that there was a conspiracy among patent owners, in its brief the Government refers, among other things, to the fact that Armstrong has a patent for a type of hardboard in the manufacture of which a varnish binder is used (Brief, p. 54).

The Government's brief, however, makes no mention of the fact that no license thereunder has ever been requested or granted either to Masonite or any other person, firm or corporation.

In the stipulation the facts as to the Armstrong patent were stated as follows (R. 660):

"During the year 1931 and while Armstrong was carrying on its research in connection with the production of fibreboard insulation its research department developed a type of hardboard product which could be manufactured with the use of a varnish binder. Employees of Armstrong's research department obtained a patent on such product and the patent was assigned to Armstrong Cork Company. The patent is No. 1,809,316 and is dated June 9, 1931. Based upon Armstrong's studies no commercial product of the hard board covered by its said patent was ever manufactured, because in the opinion of Armstrong's executives the cost of manufacture would be so great that the product could not be marketed in competition with the hardboard products manufactured by Masonite under its patents and sold by the Masonite Corporation."

The stipulated facts further show that not only in 1931 but again in 1938 Armstrong gave consideration to the matter of manufacturing Masonite hardboard under the Masonite patents. The stipulation reads (R. 660, 661):

"\* \* \* Extensive studies were made [by Armstrong] regarding the cost of a manufacturing plant and its operation. In this connection Masonite Corporation permitted the Armstrong representatives to examine its manufacturing plant and furnished certain information regarding costs of manufacture. As a result of these studies it was again concluded

that it would not be possible with the small volume which the Armstrong Company could reasonably expect to produce and market to manufacture Masonite hardboard as cheaply as Masonite Corporation was manufacturing it, taking into consideration every item of cost, including the cost of a manufacturing license and the royalties which would be payable thereunder, and as a matter of business judgment, therefore, it was determined not to obtain a manufacturing license from the Masonite Corporation."

Upon a consideration of the stipulated facts, therefore, it is clear beyond dispute that appellee Armstrong did not enter into any conspiracy to restrain trade and that the inference that it did, which the Government counsel attempts to draw, is entirely unwarranted.

## POINT II

At the time of the trial the issues attempted to be raised in reference to the 1933 and 1936 agreements had become moot and academic, and on that ground alone the complaint should have been dismissed.

It appears from the allegations of the complaint that all of the contractual provisions upon which the Government relies as constituting a restraint or monopolization of interstate commerce in Masonite hardboard were contained in license and agency agreements entered into by Masonite with the several appellees, including Armstrong, in the years 1933 and 1936. This action was not commenced by the Government until some time after March 11, 1940 (R. 1).

The testimony shows that the license and agency agreements originally entered into in 1933 were superseded by agreements entered into in October 1936 (R. 660). The testimony also shows that prior to the date of the trial, on April 2, 1941, Masonite and Armstrong entered into a new agency agreement entitled "Appointment of Agent, effective as of March 20, 1941" (R. 663). A copy of such agency agreement is appended to the supplemental answer of Armstrong (R. 117—125).

By its express terms the 1941 agreement superseded the 1936 agreement. Paragraph 26 of the 1941 agreement reads as follows:

**"Superseding Previous Agency Agreements.—**

When this Agreement shall have been duly executed by the parties and delivered pursuant to authorization by each of the parties, this Agreement shall supersede in all respects the existing agreement between Manufacturer [Masonite] and Agent [Armstrong] dated October 29, 1936, and any supplement or supplements thereto, which said agreement and said supplements shall thereby be and become terminated in all respects, anything therein to the contrary notwithstanding." (R. 125)

Before executing and delivering the 1941 agreement a specimen copy thereof was submitted to the Assistant Attorney General of the United States in charge of the anti-trust division of the Department of Justice, who was advised that it was the intention of the defendants to enter into separate agreements with Masonite and each of the defendants in the form and containing the provisions as submitted to the Government counsel. Thereafter Government counsel informed counsel for the several defendants that while the Assistant Attorney General could not undertake to express any opinion regarding the

legality of either the form or the contents of the proposed new agreement, as far as the Government was concerned, the defendants were free to enter into any agreement or agreements as they might determine.

No objection, however, was expressed on behalf of the Government to the execution and delivery of the proposed new agreement by the defendants, including the defendants Armstrong and Masonite.

The foregoing allegation is set forth in paragraphs 2 and 3 of the supplemental answer of the defendant Armstrong (R. 116, 117).

In addition, in its supplemental answer in paragraph 4 Armstrong alleged an affirmative defense as follows:

“By reason of the execution and delivery of said new agency agreement and the termination of the said agreement dated October 29, 1936, and the supplements thereto, in the circumstances hereinabove alleged, the issues purportedly raised in the complaint herein have become and now are moot and academic and there is, therefore, no issue now before this Court nor is there a case or controversy within the meaning of Section 2 of Article III of the Constitution of the United States, raised by the complaint as to said defendant Armstrong.

“Wherefore, this defendant prays that the complaint herein be dismissed as against it.” (R. 117)

Inasmuch as the relief sought in this action by the Government is by way of an injunction and which would relate only to the future, the voluntary cancellation of the 1936 agreement in its entirety several weeks before the trial renders the issues in this case moot.

*Standard Oil Co. (Indiana) et al. v. United States,*  
283 U. S. 163, 181, 182;

*United States v. Hamburg-Amerikanische Packet-  
fahrt-Actien Gesellschaft*, 239 U. S. 466, 475;  
*Berry v. Davis*, 242 U. S. 468;  
*Commercial Cable Co. v. Barleson*, 250 U. S. 360;  
*Alejandrino v. Quezon*, 271 U. S. 528;  
*United States v. Anchor Coal Co.*, 279 U. S. 812.

In the *Standard Oil* case restrictions in licenses under patents as to the quantity of gasoline that might be produced under the license, restrictions as to the territory in which the licensee might operate, as well as an option in favor of the licensor upon gasoline produced by the licensor were voluntarily cancelled prior to the entry of a decree by the District Court holding the licenses to be restraints of trade and in violation of the Sherman Act. Upon appeal to this court, in an opinion by Justice Brandeis, it was held that the issues as to the objectionable restrictions in the licenses had become moot. It was said in the opinion (283 U. S. 163, at page 182):

“ \* \* \* As the relief here sought is an injunction, and hence relates only to the future \* \* \* the alleged validity of such provisions has become moot.” (Citing cases.)

In the circumstances, therefore, the defense asserted in the supplemental answer of the appellee Armstrong that the issues tendered by the complaint had become moot upon the execution of the 1941 agreement, although not considered by the District Court, is nevertheless a valid defense and on that ground alone this court is warranted in affirming the decree below.

### POINT III

**The agency agreement between Masonite and Armstrong is not an agreement to fix resale prices and it is not *per se* a restraint of trade.**

The gist of the Government's claim on this appeal is that the agency agreements in effect between Masonite and the other appellees (including Armstrong) are *per se* a restraint of trade. While the 1941 agreement has no express provision covering the point, government counsel argues that it is to be inferred from the provisions of the agency agreement that Masonite has agreed to sell Masonite hardboard to buyers making purchases directly from Masonite at the same prices at which authorized agents, such as Armstrong, are authorized to sell the commodity to buyers.

The only provision of the 1941 agreement in this respect reads as follows:

"4. Prices, Terms and Conditions of Sale.— All sales and quotations shall be made by Agent at such prices and upon such terms, conditions and provisions as may be established by Manufacturer from time to time for the respective classes of buyers to which Agent is authorized to sell and as Manufacturer shall set forth in its published catalogues and price lists from time to time, copies of which shall be furnished Agent promptly when issued." (R. 119)

Such a provision is, of course, essential in order that the agency relationship may be stated completely and the scope of the agent's authority fully defined. The principal, Masonite, must, of necessity, establish the prices

at which the agent may sell and transfer title to the principal's goods.

The testimony shows that it is the practice of Masonite to sell directly to the building trades industry at the same prices at which the agents are authorized to sell Masonite hardboard (R. 659, 660).

According to the Government, the mere appointment of an agent with authority to sell the goods of the principal is inherently illegal, if as an incident of the relationship the principal states the price at which the agent is authorized to sell and impliedly (as here) covenants that the agent's authorized selling price shall be the same as the principal's price on sales made directly by the principal.

In other words, the Government's position seems to be that because common honesty and fair dealing between principal and agent require that the price at which the principal sells directly to a buyer shall be the same as the price at which a sale is made upon orders obtained by agents, the arrangement between the principal and the agent is *per se* a restraint of trade and a price-fixing agreement.

It is respectfully submitted that the amazing position of the Government finds no support, either in the provisions of the Sherman Act or in a well-established commercial institution, a *del credere* agency (see discussion of the history of *del credere* agreements and numerous cases in which their validity has been upheld in the separate brief on behalf of appellee Masonite).

The circumstance of uniformity of price in agency sales and direct sales does not make the arrangement a price-fixing agreement within the anti-trust laws.

Obviously, the arrangement is not a restraint of trade, because:

(1) The price at which the agent may sell and at which the principal impliedly or expressly covenants to sell the same commodity, owned by the principal, is fixed, not by concerted action, but by the principal, Masonite, acting alone.

(2) The price applies to a commodity, i.e., Masonite hardboard, manufactured and owned by Masonite down to the time when title in the goods is transferred to the ultimate buyer.

(3) Masonite, as the principal in the agency relationship, employs the agent to do exactly what Masonite itself could do, namely, sell the patented products, manufactured and owned by Masonite, to the ultimate buyer.

(4) The sole reward to the agent is the commission which the agent receives on the sale by Masonite to the ultimate buyer; such commission is comparable to the expense Masonite would otherwise incur by employing additional salesmen to sell its product directly to the ultimate buyer.

(5) There is no attempt to control the price after title has passed to a buyer.

(6) The whole arrangement, instead of being a restraint, is plainly designed to promote, and actually has the direct effect of promoting, trade and commerce in Masonite hardboard.

It cannot be doubted that it would constitute a breach of faith on the part of Masonite, if, after having authorized an agent to sell at a stated price, Masonite immedi-

ately offered the same product in competition with the agent at a lower price. No agent would continue in an agency relationship with Masonite if it resorted to such a dishonorable practice.

From the point of view of a buyer, unless Masonite's price upon a direct sale is the same as an agency sale, there would be a basis to claim a violation of Section 2 of the Clayton Act (as amended by the Robinson-Patman Act).<sup>\*</sup> Therefore, as a matter of law, the price at which Masonite sells its hardboard directly must necessarily be the same as the price at which Masonite's agent is authorized to sell Masonite hardboard.

The Government's argument is devoid of any merit whatsoever.

In support of its argument that the agency agreement is a restraint of trade *per se*, the Government counsel relies primarily upon such cases as *United States v. Trenton Potteries*, 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *Ethyl Gasoline Corporation v. United States*, 309 U. S. 436.

However, none of those cases has any application here.

In the *Trenton Potteries* case, competitors controlling 82% of the manufacture and sale of vitreous pottery agreed upon the price at which the commodity manufactured by each of the parties to the agreement would be sold. It was argued in defense that the agreed prices were reasonable. That defense, however, was rejected by this court.

In the *Socony-Vacuum* case, a number of competitors, engaged in the purchase and sale of oil, entered into an agreement the direct effect of which was to prevent excess

<sup>\*</sup> 38 Stat. 730; 49 Stat. 1526; 15 U.S.C.A. secs. 13(a) and (c).

production of oil from depressing the market price. It was held in this court that the agreements were within the rule of the *Trenton Potteries* case and did not come within the principle stated by this court in *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, where selling agency agreements among a number of coal producers were upheld.

The *Ethyl Gasoline* case, unlike the case at bar, involved the improper use of a patent covering a liquid (Ethyl compound) to control the price of finished gasoline, a component part of which consisted of the patented liquid.

In our case, there is no charge of an illegal use of patents to control unpatented articles. There is, moreover, no charge that illegal restrictions were inserted in licenses to use a patent.

There is no affirmative proof outside the provisions of the agency agreements upon which the Government can rely in support of its allegation that the appellees entered into an illegal combination to restrain trade.

The Government failed utterly to prove any restraint of trade.

As held by the court below, the case at bar is clearly within that part of the holding in *United States v. General Electric Co., et al.*, 272 U. S. 476, where this court held (at p. 488):

"We are of opinion, therefore, that there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer

and fixing the price by which his agents transfer the title from him directly to such consumer. The first charge in the bill can not be sustained."

The record shows that the provisions of the 1941 agency agreements follow as closely as possible the provisions of the agency agreements held not to constitute a restraint in the *General Electric* case.

The provision in regard to prices in the agency agreement in the *General Electric* case is substantially the same as here. There the agreement provided:

"\* \* \* All sales and quotations shall be made only at such prices, upon such terms and under such conditions as may be established by the Manufacturer from time to time, and the Agent shall at all times observe the Manufacturer's Instructions to Form B Agents hereto attached and all amendments thereto."

A more complete discussion showing that the case at bar is *a fortiori* within the rules stated in the *General Electric* case is set forth in the separate brief on behalf of appellee Masonite Corporation.

The Government's brief on this appeal, perhaps inadvertently, makes inaccurate statements regarding the agency agreements in the *General Electric* case. For example, it is stated in the Government's brief (at p. 81) that "it is a fair inference from the record" in the *General Electric* case that sales of lamps made by General Electric through its own salaried employees "were not made in the same markets or to the same customers ordinarily served by the agents" of General Electric. Upon an examination of the record and the briefs in the *General Electric* case it will be seen that the "fair inference" actually conflicts with the facts in the *General*

*Electric* case. It appears from that record that the direct sales by General Electric and agency sales were in active competition for the trade not only of "the general public", but also for purchases by "parties under written contracts" and for the class of trade designated as "free renewal service" (see chart entitled "Flow of Lamps From General Electric Company's Factories and Warehouses to Consumers" opposite page 10 of the brief for General Electric Company in this court, October Term, 1926, No. 113).

Appellees here do not contend, as the Government suggests in its brief, that the *General Electric* decision grants "broad immunity" from the application of the Sherman Act upon agency relationships. The point is that an agency agreement *per se* does not constitute a restraint of trade. It is only when there is affirmative proof of an illegal restraint of trade that any arrangement, whether it be agency or otherwise, falls within the condemnation of the Sherman Act.

*Appalachian Coals, Inc. v. U. S.*, *supra*, 288 U. S. 344;

*Standard Oil Co. v. United States*, *supra*, 283 U. S. 163.

In the *Standard Oil* case Justice Brandeis, writing for this court, said (283 U. S. 163, at p. 179):

"\* \* \* By virtue of their patents they had individually the right to determine who should use their respective processes or inventions and what the royalties for such use should be. To warrant an injunction which would invalidate the contracts here in question, and require either new arrangements or settlement of the conflicting claims by

litigation, there must be a definite factual showing of illegality. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238."

The agency agreements were entered into in order to accomplish a lawful purpose, that is, to provide additional selling outlets for Masonite hardboard. Even if it be assumed that the implied promises of Masonite to sell Masonite hardboard at the same price at which the agents may sell its product to purchasers and the express promise that Masonite will not change its price without prior notice to the agents are regarded as technical restraints, such restraints would clearly be incidental to the accomplishment of the main, lawful purpose. Therefore, under the established rules, such technical restraints would not be held unreasonable within the meaning of the Sherman Act.

*United States v. American Tobacco Company*, 221

U. S. 106, 177;

*Appalachian Coals, Inc. v. United States*, *supra*,  
288 U. S. 344, 360.

There is no evidence in the record before this court on this appeal that the prices fixed by Masonite for the sale of its own hardboard, either directly or through agents, have any effect upon the price of any competing materials or any other commodity of commerce. There is, therefore, no possible basis for holding that the intent of the appellees was to monopolize trade and commerce in building materials generally or in any other commodity.

*United States v. Standard Oil Company*, 221

U. S. 1.

The court is fully warranted in holding that neither by reason of intent nor the inherent nature of the agency agreements themselves nor of any acts done thereunder is there shown to be any prejudice to the public interest by unduly restricting competition or obstructing the course of trade; that under the tests frequently stated by this court in numerous decisions construing the Sherman Act, the agency agreements do not constitute illegal contracts or combinations.

*Nash v. United States*, 229 U. S. 373;

*Chicago Board of Trade v. United States*, 246 U. S. 231;

*Window Glass Manufacturers v. United States*, 263 U. S. 403;

*Maple Flooring Association v. United States*, 268 U. S. 563;

*Paramount Famous Corporation v. United States*, 282 U. S. 30;

*Standard Oil Company v. United States*, 283 U. S. 163, at page 169.

In *Appalachian Coals, Inc. v. U. S.*, *supra*, this court said (288 U. S. 344, at pp. 360 and 361):

“In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. ‘The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.’ *Chicago Board of Trade v. United States*, *supra*. The familiar illus-

trations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. . . .

In that case, as previously noted, this court considered the legality under the Sherman Act of agreements between producers of coal pursuant to which one company was constituted exclusive selling agent for all the producers. In upholding such agency relations this court said further (288 U. S. 344, at p. 377):

“ . . . The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies, and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint. [Citing cases.]

“The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be ‘a definite factual showing of illegality.’ *Standard Oil Co. v. United States*, 283 U. S. p. 179. . . .”

In sum, therefore, we believe it may truly be said that the agency agreements in suit were normal and usual contracts to further trade by a normal and usual method, and that they clearly fall outside the prohibitions of the Sherman Act.

### CONCLUSION

**The judgment below should be affirmed.**

Dated: April 6, 1942.

Respectfully submitted,

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